

WASPA Member (SP)	AMV
Information Provider (IP)	Bling Mobile
Service Type	Various irregularities
Source of Complaint	Andre Dorfing
Complaint Number	#4674
Code of Conduct Version	5.7
Date of Adjudication	09/10/2008

Complaint

The Complainant in this matter stated the following:

“I have been receiving unknown sender ID MMS for the past few weeks but I keep on deleting them as I dont know what they are. What I do know is that they are mobile porn which was not requested. Since there was no opt out info provided, I didnt do anything. The MMS are becoming more regular now and I received 2 last night for instance. The URL always starts with the same domain name but the file itself seems to change. The URL provided last night is <http://wap.mob365.net/ncrgonpj-z1jg55-szht-ea08.wml> . I finally clicked on the link as its become very annoying. It takes you to a WAP page where you have to watch the video and then only are you provided with opt out information. A number to call or a SMS to be sent to a shortcode. The number to be called is 011-4610317. On calling this number it is confirmed that it is Mobile 365, that it is a marketing ploy and they basically don't care that I received the MMS. They won't say where they received my number from either. I contacted Vodacom who has confirmed that the company sends out unsolicited MMS and the best they can do is to request that my number be unsubscribed. No confirmation on this yet. I want my number to be totally removed from their database! I did not request anything. I no longer want to receive any MMS from them. Working in the industry I know that what they are doing is illegal and against WASPA Terms. I need some action on this please.”

SP Response

The SP's response is reproduced here in full:

“On the 16th March 2008 at 10:04 the user accessed our mobile content site through an advertisement on an affiliates website.

While browsing the internet on their **NokiaN95** cellphone the user responded to an advert for our Gamezone WAP site.

The user did not purchase any content and was not charged however they did click on a "claim your free item" link which offered a choice of one free item.

If the user decides to dispute browsing Gamezone at the time above he should ask his network operator to provide full internet browsing data for 16th March so we can prove that access to blingmob.com took place at the above time.

The site states that content purchasers or users who access free content may receive future promotions from us, and that they should sms STOP ALL to 31434 to opt-out, or to call our helpline number.

We have not had an opt-out request from this user.

We have since contacted the user with (free) promotions in relation to other services we offer.

These are **not** adult promotions.

AMV do not operate any adult services in South Africa.

The site features bikini content only and certainly no adult content.

The user has not purchased any content and has not been charged.

We have now ensured the user is Blacklisted from our promotional database.

If I can be of further assistance, please let me know.”

Sections of the Code considered

2.1. An “adult service” is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.

5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:

(a) A recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure must be included at the start of any messaging service, for example: "reply STOP to opt out".

(b) Recipients of premium rate or non-replyable messages must have the option to opt out at a cost of R1 or less. This opt-out instruction must be included in every commercial premium rate or non-replyable message, for example. "sms STOP to 32xxx to opt out".

5.1.5. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

5.1.6. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

(a) the recipient has requested the message;

(b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her.

It has come to the attention of the Adjudicator that the SP in this matter together with the IP has been involved in several complaints arising from the public pertaining to the same issues. In this case it is regarding its WAP Gamezone. In some cases the SP together with the IP were given the benefit of the doubt. However, after reviewing the various mediums in which the SP and IP have promoted its services, it is the opinion of the Adjudicator that the respective SP and IP have not made any real effort to bring its advertising methods and behavior in line with what is required from them in terms of the WASPA Code of Conduct. In all its responses it would seem that they offer the same response, not necessitating any real effort on its behalf to clarify in no uncertain terms why the same complaints keep on resurfacing.

In this particular case the Complainant has stated that the SP did not provide him with any sender id, no age verification, no opt in request, no opt out instructions, and that in his opinion it amounts to an unsolicited spam sms.

The SP explained in its response that the Complainant accessed its mobile content site through an advertisement on an affiliate's website. The SP then further stated that the site states that content purchasers or users who access free content may receive future promotions from them, and that they should sms STOP ALL to 31434 to opt-out, or to call our helpline number.

While it might seem that such practice is valid one has to take a few things into perspective. Section 5.2.1 of the Code states that any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has **requested** the message;
- (b) the message recipient has a **direct and recent prior commercial relationship** with the message originator **and would reasonably expect to receive** marketing communications from the originator; or

(c) the **organisation supplying the originator with the recipient's contact information** has the recipient's **explicit consent** to do so.

In the opinion of the Adjudicator the SP did not fulfill any of these criteria.

Should the SP however have argued that this was indeed not unsolicited messages, then one does not have to look far to find that the SP did not adhere to various sections of the code pertaining to the sending of commercial messages.

Section 5.1.1 states that all commercial messages must contain a valid originating number and/or the name or identifier of the message originator. The SP did not comply with this.

Section 5.1.4 states inter alia that the reply 'STOP' procedure must be included at the start of any messaging service, for example: "reply STOP to opt out". This was not adhered to by the SP.

Section 5.1.7 states that upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained. According to the Complainant in this matter, this was not given to him.

The SP further responded by stating that it does not operate any adult facilities within South Africa. After reviewing the blingmob.com website, the Adjudicator beg to differ in terms of section 2.1 of the Code and is of the opinion that some of its material does indeed contain images that are more than just as to what the SP refers to as "Bikini content".

In this case the Complainant allegedly downloaded a free item from the SP's Gamezone. Section 8.1.2 inter alia states that the content of a service should not be contrary to the reasonable expectation of those responding to the promotion. The further content delivered to the Complainant certainly did not meet this requirement by the Code.

Section 8.1.3 states that explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service. The SP did not conform to this.

The Complaint is upheld.

In determining an appropriate sanction, the following factors are considered:

- Any previous breaches of sections found to have been breached;
- Rectifying actions taken by the SP in resolving the matter informally.

The SP is fined R 50 000-00. This amount has to be paid within 5 (five) working days to the WASPA Secretariat from the date of adjudication.

The SP is further instructed to ensure its compliance with the relevant sections considered in all current and future advertisements.

The WASPA Secretariat is requested to forward a copy of this report to the WASPA Media Monitor, together with a request to review the SP's future compliance with the relevant sections of the Code of Conduct.

Should it be found that any further breaches of the WASPA Code of Conduct continue to surface due to any wrongdoings on behalf of the said SP, section 13.4.1 (e) which validates a suspension of the members from WASPA for a defined period will have to be considered, and in the opinion of the Adjudicator must be considered. Similarly, if the IP continue in its breaches, a notice in terms of section 13.5.1 must be considered.
